

NOTICE TO PLEAD

Petitioners: You are hereby notified to file a written response to the enclosed New Matter within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Kathleen M. Kotula
Kathleen M. Kotula
Attorney for Respondent

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MONTGOMERY COUNTY :
BOARD OF ELECTIONS AND :
BUCKS COUNTY BOARD OF :
ELECTIONS, :

Petitioners :

v.

No. 339 MD 2021

VERONICA DEGRAFFENREID, :
in her official capacity as Acting :
Secretary of the Commonwealth of :
Pennsylvania, :

Respondent :

ANSWER AND NEW MATTER TO PETITION FOR REVIEW

Respondent, Acting Secretary of the Commonwealth Veronica Degraffenreid, submits this Answer and New Matter to the October 1, 2021 Petition for Review (the “Petition for Review”) filed by Petitioners Montgomery County Board of Elections and Bucks County Board of Elections.

I. The Parties

1. Respondent admits the first sentence of paragraph 1. Respondent further admits that the Montgomery County Board of Elections administers primaries and elections in Montgomery County in cooperation with the Pennsylvania Department of State.

2. Respondent admits the first sentence of paragraph 2. Respondent further admits that the Bucks County Board of Elections administers primaries and elections in Bucks County in cooperation with the Pennsylvania Department of State.

3. Admits. In addition, Respondent's powers and duties are outlined in other parts of the Election Code and voter registration law including but not limited to 25 P.S. §§ 3031.1 et seq. and 25 Pa. Cons. Stat. § 1201 et seq.

II. Nature of Action and Jurisdictions

4. The allegations of paragraph 4 set forth legal conclusions to which no response is deemed necessary. Respondent admits that this Court has original jurisdiction over the Petition for Review.

III. Factual Background

5. The allegations of paragraph 5 set forth legal conclusions to which no response is deemed necessary.

6. The allegations of paragraph 6 set forth legal conclusions to which no response is deemed necessary.

7. The allegations of paragraph 7 set forth legal conclusions to which no response is deemed necessary. Respondent admits that Act 77 was duly enacted and that it provided the opportunity for all qualified electors in Pennsylvania to vote by mail, without any excuse required.

8. The allegations of paragraph 8 set forth legal conclusions to which no response is deemed necessary. The statutes excerpted in paragraph 8 speak for themselves.

9. The allegations of paragraph 9 set forth legal conclusions to which no response is deemed necessary. 25 P.S. § 3146.8 speaks for itself, and any characterization of the statute as providing direction for either electors or election officials is for the Court to determine.

10. Respondent admits the first sentence of paragraph 10 and that the document attached as Exhibit A to the Petition for Review is the September 11, 2020, guidance. The document is a writing that speaks for itself.

11. The allegations of paragraph 11 set forth legal conclusions to which no response is deemed necessary. Respondent denies any characterization of the September 11, 2020 guidance as “allowing” county election officials “discretion” to determine if the declaration envelope is appropriately completed. The adequacy of

the declaration envelope is an issue of fact unique to each absentee or mail-in ballot that is submitted.

12. Respondent admits the first sentence of paragraph 12 and that the document attached as Exhibit B to the Petition for Review is the September 28, 2020, guidance. The document is a writing that speaks for itself.

13. The allegations of paragraph 13 characterize the Supreme Court of Pennsylvania's opinion in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020). The opinion is a writing that speaks for itself.

14. The allegations of paragraph 14 purport to characterize one of the arguments made in the Supreme Court of Pennsylvania litigation. The record in that litigation and the Supreme Court's opinion are writings that speak for themselves.

15. The allegations of paragraph 15 quote from the opinion in the Supreme Court of Pennsylvania litigation. That opinion is a writing that speaks for itself.

16. The allegations of paragraph 16 purport to characterize the Opinion Announcing the Judgment of the Court ("OAJC") in the Supreme Court of Pennsylvania litigation. The OAJC is a writing that speaks for itself. Respondent denies any characterization of the OAJC as the opinion of "the Court" or of a "four-justice majority."

17. The allegations of paragraph 17 characterize the judicial opinions published at 241 A.3d 1058. Those opinions are writings that speak for themselves.

18. The allegations of paragraph 18 purport to characterize the concurring opinion of Justice Wecht in the Supreme Court of Pennsylvania litigation. Justice Wecht's opinion is a writing that speaks for itself.

19. The allegations of paragraph 19 purport to characterize the concurring opinion of Justice Wecht in the Supreme Court of Pennsylvania litigation. Justice Wecht's opinion is a writing that speaks for itself.

20. Respondent admits that the Pennsylvania General Assembly has not passed any amendment to or revision of 25 P.S. § 3150.16 or 25 P.S. § 3146.6. The remaining allegations of paragraph 20 constitute legal conclusions and argument to which no response is deemed necessary.

21. The allegations of paragraph 21 characterize the record and decision in the litigation referenced in paragraph 21 (the "Ziccarrelli W.D.Pa. Litigation"). That record and decision are writings that speak for themselves.

22. The allegations of paragraph 22 characterize the record and decision in the Ziccarelli W.D.Pa. Litigation. That record and decision are writings that speak for themselves.

23. Respondent admits that the 2021 Pennsylvania Primary was held on May 18, 2021, and that the Montgomery County and Bucks County Boards of

Elections purport to have approved the canvassing of ballots received by 8:00 p.m. on Election Day and in envelopes with a signed declaration but no date. After reasonable investigation, Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations related to whether the ballots were actually counted or what Petitioners' bases for counting them were.

24. With respect to the first two sentences of paragraph 24, after reasonable investigation, Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations related to how many ballots in undated envelopes were submitted in the Petitioners' respective counties in the 2021 Primary Election and 2020 General Elections. The third sentence of paragraph 24 sets forth legal arguments and conclusions to which no response is necessary.

25. Admits. The e-mail referenced is a writing that speaks for itself.

IV. Declaratory Relief Sought

26. The allegations of paragraph 26 set forth legal conclusions to which no response is deemed necessary.

27. The allegations of paragraph 27 set forth legal conclusions to which no response is deemed necessary. Respondent admits that there is a divergence of views among election officials in the Commonwealth of Pennsylvania as to how mail-in and absentee ballots timely received and signed but submitted in undated envelopes should be canvassed.

28. Respondent admits that Petitioners seek such a declaration.

29. Respondent admits that if Petitioners' understanding of the law on this issue is correct, then voter disfranchisement would be likely, and a declaration by this Court is necessary to avoid further confusion and such a likelihood.

NEW MATTER

1. Respondent has, at all times, acted reasonably and in good faith.

2. Petitioners have not been, and will not be, harmed by following the Secretary's guidance to date.

3. The Petition for Review fails to state any claim upon which attorney fees and costs could be granted.

4. Respondent reserves the right to further amend her Answer and New Matter, to add affirmative and other defenses, and to assert other claims as this case proceeds.

5. On or about November 4, 2021, the U.S. Department of Justice brought an action against the State of Texas alleging, in part, violations of the materiality provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). *See United States v. Texas*, 5:21-cv-01085 (W.D. Tex. 2021).

6. The OAJC in *In re Canvass* noted that one of the parties argued, "with some persuasive force," that refusing to count undated ballots would violate the materiality provision of the Civil Rights Act of 1964. *See* 241 A.3d at 1074 n.5.

7. That provision prohibits any person acting under color of state law from “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

8. In his concurring opinion, Justice Wecht noted this issue and stated with respect to it, “[g]iven the complexity of the question, I would not reach it without the benefit of thorough advocacy.” *Id.* at n.54. He further noted, “[it] is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.” *Id.*

9. On or about November 15, 2021, the issue of whether to count mail-in ballots submitted in undated declaration envelopes was considered by the Lehigh County Board of Elections, which decided by a vote of 3-0 to count such ballots. On or about November 17, 2021, David Ritter filed an appeal, pursuant to 25 P.S. § 3157, from that decision to the Court of Common Pleas of Lehigh County.

10. On or about November 30, 2021, the Honorable Edward D. Reibman of that court issued an order denying that appeal and affirming the Lehigh County Board of Elections’s decision to count, in relevant part, 257 mail-in ballots submitted in undated declaration envelopes. Judge Reibman’s November 30, 2021 opinion

noted the analysis in Justice Wecht's concurring opinion in *In re Canvass*, and also noted the relevance of federal law's materiality provision.

11. On or about December 1, 2021, Mr. Ritter appealed Judge Reibman's November 30, 2021 decision to this court. That appeal is docketed under the caption *Ritter v. Lehigh County Board of Elections*, No. 1322 CD 2021.

Respectfully submitted,

Date: December 6, 2021

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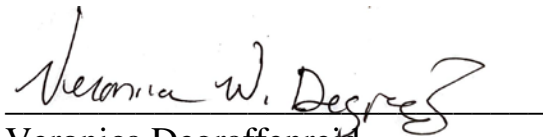
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Counsel for Respondent

VERIFICATION

I, Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, hereby state that I am authorized to make this verification, and that the statements made in the foregoing Answer and New Matter to Petition for Review are true and correct to the best of my knowledge, information and belief. I understand that this statement is being made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Veronica Degraffenreid
Acting Secretary of the Commonwealth of
Pennsylvania

CERTIFICATE OF COMPLIANCE

I, Kathleen M. Kotula, Executive Deputy Chief Counsel for the Department of State, certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen M. Kotula
Kathleen M. Kotula

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Respondent :

CERTIFICATE OF SERVICE

I, Kathleen M. Kotula, Executive Deputy Chief Counsel for the Department of State, hereby certify that on December 6, 2021, I caused to be served a true and correct copy of the foregoing document titled Answer and New Matter to Petition for Review to the following:

All Counsel of record via PACFile

/s/ Kathleen M. Kotula
Kathleen M. Kotula